Filed 4/24/19 Sabori v. Dollar Tree Stores CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ALEXANDRA SABORI et al., Plaintiffs and Appellants, v. DOLLAR TREE STORES, INC., Defendant and Respondent.	B284350 (Los Angeles County Super. Ct. No. BC598475)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marc Marmaro, Judge. Affirmed.

The Yarnall Firm and Delores A. Yarnall; DeWitt Algorri & Algorri and Patrick S. Nolan for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Fred Puglisi and Jay Ramsey for Defendant and Respondent.

This action arises out of criminal conduct by Carlos Martinez while he was employed as a store manager by defendant and respondent Dollar Tree Stores, Inc. (Dollar Tree). Plaintiffs and appellants are six women[1] who allege that Martinez used his cell phone to surreptitiously record them while they used a store restroom. They sued Martinez[2] and Dollar Tree for invasion of privacy, negligent hiring, and other claims.

The trial court granted summary judgment in Dollar Tree's favor, and plaintiffs appeal from that judgment. We affirm the judgment.

BACKGROUND

Dollar Tree's employment of Martinez

Dollar Tree hired Martinez on June 17, 2014. As part of its hiring process, Dollar Tree ran a background check on Martinez that revealed no prior criminal history. On Dollar Tree's employment application, Martinez listed two previous employers, FAMSA and Michaels Arts & Crafts (Michaels).

From June 17, 2014 to September 7, 2015, Martinez worked as the store manager at the Dollar Tree store located at 4953 Whittier Boulevard in Los Angeles. On or before his first day of employment, Martinez received Dollar Tree's Store Associate Handbook, which prohibits unwanted sexual advances and inappropriate, offensive, harassing, or abusive behavior.

Martinez's criminal conduct

On September 7, 2015, plaintiff Alexandra Sabori (Sabori) visited the Dollar Tree store where Martinez was employed as a store manager. When Sabori used the store restroom, Martinez

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[1] Plaintiffs are Dollar Tree employees Cinthya Hernandez and Angelina Northup and customers Alexandra Sabori, Jennifer Anaya, and Ternesha Peoples.

[2] Martinez is not a party to this appeal.

surreptitiously recorded her with his cell phone. Sabori discovered the cell phone and contacted the police. Martinez was arrested and his employment at Dollar Tree terminated that same day. Martinez later admitted video recording Sabori and pled no contest to a misdemeanor.

PROCEDURAL HISTORY

Plaintiffs commenced this action against Dollar Tree on October 20, 2015. Their operative first amended complaint alleged causes of action for invasion of privacy; negligent hiring, supervision and retention; negligent and intentional infliction of emotional distress; and violation of the Unruh Civil Rights Act. Plaintiffs also asserted class claims on behalf of similarly situated persons and sought punitive damages against Dollar Tree.

Dollar Tree moved for summary judgment, or in the alternative, summary adjudication, as to each of plaintiffs' causes of action. On February 17, 2017, the trial court granted Dollar Tree's motion as to all causes of action except violation of the Unruh Act. As to that cause of action, the trial court requested additional briefing and set a further hearing.

On April 14, 2017, the trial court granted Dollar's Tree's motion as to the Unruh Act claim. Judgment was entered in Dollar Tree's favor on May 8, 2017. The trial court denied plaintiffs' motion for a new trial, and this appeal followed.

DISCUSSION

I. Summary judgment: legal principles and standard of review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether,

despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action. . . . [T]he defendant need not himself conclusively negate any such element." (*Id.* at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

II. Plaintiffs' vicarious liability theories

A. Respondeat superior

Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of its employees committed within the scope of employment. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.) Vicarious liability may also be

imposed under respondeat superior for an employee's intentional torts or criminal acts. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 (*Lisa M.*).) An employer will not be held liable for an employee's criminal act, however, absent a sufficient causal nexus to the employee's work. (*Id.* at p. 297.)

The nexus required for respondeat superior liability is not "'but for'" causation. (*Lisa M., supra*, 12 Cal.4th at p. 298.) "That the employment brought tortfeasor and victim together in time and place is not enough." (*Ibid.*) Rather, the tortious act must be "foreseeable from the employee's duties" or "'"sure to occur in the conduct of the employer's enterprise"' [Citation.]" (*Id.* at p. 299.) Foreseeability "'merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.' [Citations.]" (*Ibid.*, citing *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 619.) "The question is not one of statistical frequency, but of a relationship between the nature of the work involved and the type of tort committed. The employment must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought." (*Lisa M.*, at p. 302.)

In cases involving an employee's sexual assault, California courts have declined to impose respondeat superior liability when the misconduct was not motivated or triggered by anything in the employment activity "'but was the result of only propinquity and lust.'" (*Lisa M., supra*, 12 Cal.4th at p. 301, quoting *Lyon v. Carey* (D.C. Cir. 1976) 533 F.2d 649, 655.) For example, in *Lisa M.* the California Supreme Court ruled, as a matter of law, that a hospital was not vicariously liable for a technician's sexual assault of a patient during an ultrasound

imaging examination. The court reasoned that "a sexual tort will not be considered engendered by the employment unless the motivating emotions were fairly attributable to work-related events or conditions." (*Lisa M.*, at p. 301.) Because the technician "simply took advantage of solitude with a naive patient to commit an assault for reasons unrelated to his work," the court found no causal nexus between the technician's employment and the criminal act. (*Ibid.*)

In cases involving sexual misconduct rather than sexual assault, California courts have similarly refused to impose respondeat superior liability on the employer for conduct motivated solely by the employee's personal reasons. In *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992 (*Farmers*), the Supreme Court held that the county was not vicariously liable for a deputy sheriff's lewd comments, unwanted touching, and sexual propositioning of his female coworkers at the workplace and during working hours. The court reasoned that "'[i]f an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior to or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior.' [Citation.]" (*Id.* at p. 1005.) The court noted that the deputy's misconduct was motivated solely by personal reasons unrelated to the performance of his job duties. (*Ibid.*) Other cases are in accord. (See, e.g., *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1432 [no vicarious liability against employer for claims of sexual battery, false imprisonment, and intentional infliction of emotional distress]; *John Y. v. Chaparral Treatment Center, Inc.* (2002) 101 Cal.App.4th 565, 576 [treatment center operator not liable for employee's sexual molestation of resident minor]; *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal.App.4th 125, 128-

129 [employer not liable for alleged sexual assault by on-duty private security guard].)

As a matter of law, the doctrine of respondeat superior does not apply to the circumstances presented here. The undisputed evidence shows that Martinez took advantage of his position as a store manager to invade Sabori's privacy. In her declaration, Sabori states that after she requested access to the store restroom, Martinez asked her to wait so that he could ensure the restroom was properly stocked and clean. While using the restroom, Sabori noticed two cardboard boxes stacked directly in front of her. The top box had a hole punched in it. Sabori opened the box and found a cell phone with its video recording function turned on. The other plaintiffs similarly allege that Martinez made them wait while he "checked" the store restroom before allowing them access to the restroom and that they believe Martinez video-recorded them while they used the restroom.

The evidence shows no causal nexus between Martinez's tortious conduct and his employment other than "but for" causation. That Martinez's job duties gave him the opportunity to control plaintiffs' access to the store restroom and to abuse his position as a store manager in order to video record them is insufficient to hold Dollar Tree liable for that abuse. "The mere fact that an employee has the opportunity to abuse facilities necessary for the performance of his duties does not render an employer vicariously liable for the abuse." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 140.)

Plaintiffs contend they presented evidence sufficient to raise triable issues as to Dollar Tree's vicarious liability, including Dollar Tree's alleged failure to investigate Martinez's past employment references, failing to ensure that Martinez completed mandatory sexual harassment training, failing to

investigate an employee's complaints about Martinez's alleged sexual harassment of female employees, and Dollar Tree's violation of its own policy that store restrooms remain unlocked and open at all times. None of this evidence raises a triable issue as to whether there was a causal nexus between Martinez's employment and his invasion of plaintiffs' privacy while they used a store restroom. Such tortious conduct is not a risk inherent in or created by Dollar Tree's business. For purposes of respondeat superior liability, the relevant inquiry is "'"whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer."' [Citations.]" (*Farmers, supra*, 11 Cal.4th at p. 1009, italics omitted.)

Plaintiffs correctly point out that whether an employee's tortious conduct was within the scope of employment is ordinarily a factual question reserved for the jury; however, that determination is a question of law when the facts are undisputed and no conflicting inferences are possible. (*Lisa M., supra*, 12 Cal.4th at p. 299.) Such is the case here. The trial court did not err by summarily adjudicating plaintiffs' causes of action premised on respondeat superior liability.

B. Ratification

"As an alternate theory to respondeat superior, an employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. [Citation.]" (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 169-170.) Ratification "commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known. [Citations.] Corporate ratification in the punitive damages context requires actual knowledge of

the conduct and its outrageous nature." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 726.)

Plaintiffs argue, solely in support of their claim for punitive damages, that they presented evidence sufficient to raise a triable issue as to whether Dollar Tree ratified Martinez's invasion of their privacy. There is no evidence, however, that Dollar Tree knew of Martinez's alleged practice of video-recording female customers and employees while they used the store restroom. The undisputed evidence shows that Martinez's last day of work at Dollar Tree was September 7, 2015, the same day he was arrested for video-recording Sabori while she used the store restroom. There is no evidence that Dollar Tree failed to investigate or discipline Martinez upon learning of his criminal conduct.

Plaintiffs argue they presented evidence that Martinez engaged in a pattern of sexually harassing conduct toward his female coworkers. The only evidence that any Dollar Tree manager above Martinez knew about Martinez's allegedly harassing conduct was the deposition testimony of former Dollar Tree employee Evelyn Agraz. Agraz testified that she left text messages and voicemails on the cell phone of a Dollar Tree district manager named Nathan Young complaining of unwanted touching and vulgar comments by Martinez, but Young never responded. Young's failure to respond to Agraz's messages raises no triable issue, however, as to whether Dollar Tree authorized or ratified the video-recording of customers and employees using the store restroom. Agraz herself testified that she never suspected that Martinez might video record people using the store restroom, and that if she did, she would have reported it. The trial court did not err by summarily adjudicating plaintiffs' claims premised on Dollar Tree's ratification of Martinez's conduct.

III. Plaintiffs' direct liability theories

A. Negligent hiring, supervision or retention

"An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]" (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.) To establish a negligent hiring or supervision claim, a plaintiff must show that the employer knew or should have known that hiring the employee created a particular risk or hazard. (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 (*Delfino*).) The liability imposed on the employer in such cases is "direct liability for negligence, not vicarious liability. [Citation.]" (*Ibid.*)

Dollar Tree's pre-hiring investigation of Martinez revealed no prior criminal history and no indication that Martinez had surreptitiously video-recorded women while they used the restroom. There is no evidence that Dollar Tree knew or should have known of Martinez's propensity to commit such criminal acts.

Plaintiffs claim Dollar Tree was negligent in failing to contact the references and previous employers Martinez listed on his employment application and that doing so would have revealed that Martinez had been fired by two previous employers "for outrageous misconduct." The evidence shows that Martinez worked as a store manager for Michael's Stores, Inc. from February 2012 to February 2013, that he was given a verbal warning in September 2012 for performance issues concerning store standards and personnel turnover, and that he was given a final warning in January 2013 for performance issues concerning meal break compliance and payroll issues. Michaels discharged Martinez on February 4, 2013.

Prior to his employment at Michaels, Martinez worked as a store manager at FAMSA. Martinez's personnel records show that FAMSA discharged him following an investigation into employee complaints of discriminatory and harassing treatment based on national origin or sexual orientation.

The foregoing evidence creates no triable issue as to whether Dollar Tree was negligent in hiring Martinez. Martinez's personnel records from his former employers contain no indication that he would engage in the type of criminal conduct at issue in this case. Those records do not show a propensity by Martinez to use a cell phone to record women using the store restroom. (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 903 [to establish negligent supervision, plaintiff must show employer had prior knowledge of employee's propensity for sexual assault]; accord, *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1087-1088.) Contrary to plaintiffs' assertion, the evidence raises no triable issue as to whether Dollar Tree had notice of the "particular risk" of harm that would result from hiring Martinez.

Plaintiffs' also fail to raise any triable issue regarding their claims against Dollar Tree for negligent supervision and retention. Plaintiffs' evidence that Martinez purportedly failed to complete Dollar Tree's mandatory workplace harassment training is not relevant to whether Dollar Tree knew or should have known Martinez would engage in criminal acts invading plaintiffs' privacy.

Testimony by Martinez's co-workers that they complained of sexually harassing behavior by Martinez and that Dollar Tree never responded, or that Dollar Tree allowed Martinez to manage the store and conduct himself as he pleased, similarly raises no triable issue as to whether Dollar Tree was negligent with regard to Martinez's criminal conduct. "In order for there to be a duty to

prevent third party criminal conduct, that conduct must be foreseeable. [Citations.]" (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 152.) Here, the same employees who attested to being sexually harassed by Martinez also testified that they never suspected that Martinez might videotape women in the store restroom.

Lisa M. does not support plaintiffs' argument concerning Dollar Tree's liability for negligent hiring, supervision, or retention. The Supreme Court in that case remanded the matter because the appellate court "declined to decide whether plaintiff's cause of action for negligence could survive summary judgment" and therefore "did not decide whether [the employer] Hospital fulfilled its duty of care under the circumstances." (*Lisa M., supra*, 12 Cal.4th at p. 306.) The trial court here summarily adjudicated plaintiffs' negligence claims, and we find no error in the court's ruling.

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co. (2018) 5 Cal.5th 216, cited by plaintiffs during oral argument, is inapposite. That case addressed whether a construction management company's negligent hiring, retention, or supervision of an employee who sexually molested a student at a middle school construction project can be considered "accidental" and therefore a covered "occurrence" under the company's commercial general liability insurance policy. (*Id.* at p. 220.)

Plaintiffs raise no triable issue as to whether Dollar Tree's alleged negligence caused plaintiffs the harm they claim to have suffered. (*Delfino, supra*, 145 Cal.App.4th at p. 815; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1055.)

B. Negligent infliction of emotional distress and owner/operator liability

Negligent infliction of emotional distress is not an independent tort; rather, it is the tort of negligence premised on

the traditional elements of duty, breach of duty, causation, and damages. (*Ess v. Eskaton Properties, Inc.* (2002) 97 Cal.App.4th 120, 126.) The existence of a legal duty is a necessary element of plaintiffs' negligence causes of action. (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1369.)

Under California law business proprietors owe a duty to their patrons and invitees to maintain their premises in a reasonably safe condition. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229, 235.) That duty includes the obligation to take "'reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.' [Citations.]" (*Id.* at p. 235, italics omitted.) A proprietor's duty "'to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated.' [Citation.]" (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146.)

As with their claims for negligent hiring, supervision, and retention, plaintiffs' claims for negligent infliction of emotional distress and owner/operator liability fail because the undisputed evidence shows that Dollar Tree did not know and could not reasonably have known that Martinez would commit criminal acts of invasion of privacy. The trial court accordingly did not err by summarily adjudicating plaintiffs' negligence claims.

C. Unruh Act

The Unruh Act provides that all people in California are entitled "to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" regardless of their sex, or other listed characteristics. (Civ. Code, § 51, subd. (b).) It prohibits business establishments from discriminating against any person based on a listed characteristic (§ 51.5, subd. (a)), and imposes liability for

damages and penalties on anyone who "denies, aids or incites a denial, or makes any discrimination or distinction contrary to [the statute]." (§ 52, subd. (a).) The purpose of the Unruh Act is "'to compel recognition of the equality of all persons in the right to the particular service offered by an organization or entity covered by the act.' [Citations.]" (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1448.)

There is no evidence to support plaintiffs' claim that Dollar Tree discriminated against female customers and employees by denying them access to a restroom based on their sex and by redirecting them to another restroom staged with a hidden camera so Martinez could video record them surreptitiously. We reject plaintiffs' argument that Martinez's allegedly discriminatory conduct should be imputed to Dollar Tree "as the business entity in exclusive control over its premises." Plaintiffs cite no authority for imputing Martinez's conduct to Dollar Tree absent a sufficient causal nexus between that conduct and Dollar Tree's business operations.

Prowd v. Gore (1922) 57 Cal.App. 458 on which plaintiffs rely, requires such a causal nexus. In that case, a theater manager refused to allow a Black patron access to a seat in which his purchased ticket entitled him to sit. (*Id.* at p. 459.) The court found the employers liable under the Unruh Act despite their lack of knowledge of the manager's actions, but made clear that such liability was premised upon the conduct of its employee "'in and as part of the transaction of [the] business.'" (*Id.* at pp. 461-462, quoting *Otis Elevator Co. v. First Nat'l Bank* (1912) 163 Cal. 31, 39.) Here, Martinez's surreptitious recording of customers and employees who used the store restroom was not part of the transaction of Dollar Tree's business. The other cases plaintiffs cite do not discuss whether an employee's acts can be imputed to an employer for purposes of Unruh Act liability and are therefore

inapposite. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160; *Beliveau v. Caras* (C.D. Cal. 1995) 873 F.Supp. 1393; *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369.)

The trial court did not err by summarily adjudicating plaintiffs' cause of action for violation of the Unruh Act.

IV. Punitive damages

Because summary judgment was properly granted, plaintiffs' arguments concerning their alleged entitlement to punitive damages are moot. There is no independent cause of action for punitive damages. (*McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1164.) Punitive damages are a remedy, to which a party is entitled only on a viable cause of action for an underlying tort. (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801-802.) Because plaintiffs have no viable cause of action, they have no claim for punitive damages.

V. Alleged procedural defects

We reject plaintiffs' argument that summary judgment was improperly granted because Dollar Tree's motion failed to negate all theories of liability pled in the first amended complaint, specifically, an owner/operator theory of direct liability. A similar argument was rejected by the court in *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59:

> "Plaintiff suggests that, because defendant's moving papers did not seek summary judgment explicitly on the ground that defendant negated the element of causation, the trial court had no power to grant summary judgment on that ground. Plaintiff cites no authority for this contention, and we are not aware of any. [¶] . . . [¶] To require the trial court to close its eyes to an unmeritorious claim simply because the operative ground entitling the moving party to summary judgment was not specifically tendered by that party would elevate form over

> substance and would be inconsistent with the purpose of the summary judgment statute."

(*Juge, supra*, 12 Cal.App.4th at p. 69.)

We agree with the court's analysis in *Juge* and apply it here.

Moreover, the trial court here specifically found that Dollar Tree adequately addressed plaintiffs' owner/operator theory of liability both in the motion for summary judgment and the separate statement of undisputed facts. We agree with the trial court's determination that the facts alleged in support of plaintiffs' owner/operator theory of liability are the same as those alleged in support of their negligent hiring, supervision, and retention cause of action. We also agree with the trial court's finding that to the extent plaintiffs contend Dollar Tree breached a general duty to inspect, discover, and take reasonable measures to protect against Martinez's criminal conduct, they failed to plead this theory of liability in their first amended complaint and Dollar Tree was not obliged to address that theory. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254.) The record discloses no reversible error.

DISPOSITION

The judgment is affirmed. Dollar Tree is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT